

## High-Income Families and the New Child Support Laws

Effective July 1, 2017, child support laws in Illinois dramatically changed. For high-income families, the current guidelines result in a substantial decrease in child support. The purpose of this article is to highlight some of the more important issues for high-income parents.

### Deviation - Role Reversal

For high-income families, one of the primary issues will be deviation from the guidelines based on the standard of living of the parties or the family. Instead of focusing on whether the recipient of the child support is receiving a windfall, the focus is whether, in essence, the child is being deprived of financial resources.

Under the former statute, case law developed that allowed for a deviation from the guidelines, thus reducing the amount of child support to avoid a windfall to the recipient. The payor was the individual who sought the current law.

Section 505(a)(3.4) of the Illinois Marriage and Dissolution of Marriage Act (705 ILCS 5/505(a)(3.4)) creates a rebuttable presumption that the guidelines will be applied. For such a presumption to be rebutted “...once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed.” (1) Within the new statute there are indirect (2) and direct (3) deviation provisions. The direct deviation provision provides: “...The court may

*deviate from the child support guidelines if the application would be inequitable, unjust, or inappropriate.”* There are very broad financial factors for the court to consider including “...any other factor the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate...” The terms utilized in the statute (i.e. “inequitable, unjust, or inappropriate”) provide substantial flexibility in seeking a deviation.

### Gross Income

The general rule that income for child support purposes includes income from all sources and not necessarily what is shown on a tax return remains largely unchanged. However, several sections of the new statute specifically address issues that have evolved under case law developed prior to the enactment of the law.

### Income in Excess of Tables

The tables used to determine the basic child support obligation top-out with the highest monthly combined net income level at \$30,025 per month. For income in excess of this level, the statute provides that the child support “...shall not be less than it would be based on the highest level...” provided for in the statute. The court has the discretion to determine an appropriate level of child support. (4)



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**“For high-income families, one of the primary issues will be deviation from the guidelines based on the standard of living of the parties or the family.”**

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### Schiller DuCanto & Fleck Welcomes Ishita Saran



Schiller DuCanto & Fleck welcomes Ishita Saran as an Associate in our Wheaton office. Ms. Saran started her career at Schiller DuCanto & Fleck, LLP, as a law clerk in 2015. She graduated *cum laude* from The John Marshall Law School in 2017. The firm is happy to have Ms. Saran as a new member of the Schiller DuCanto & Fleck team.

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# High-Income Families and the New Child Support Laws

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By Timothy M. Daw

## Business Prerequisites

Section 505(a)(3.1)(B) of the IMDMA (5) allows the court to include as income “*Any item of reimbursement or in-kind payment received by a parent from the business ... if the item is significant in amount and reduces personal expenses.*” The statute contains examples of potentially suspect expenses (“...*a company car, free housing or a housing allowance, or reimbursed meals ...*”). This provision could result in a wide variety of expenses being added-back to declared income.

## Depreciation

Under the prior law, courts have not been receptive to allowing depreciation as a deduction from income for child support purposes. (6) Based on language in the new statute, an argument can be made that depreciation may be permissible if this is an “...*ordinary and necessary expense required to carry on the trade or business.*” (7)

## Unemployed/Underemployed Parents

Under the newly-enacted law, there are now specific provisions that apply to parents who are “*unemployed*” or “*underemployed.*” (8) Added to the current statute are directives to the courts to impute income for those persons who are “*voluntarily unemployed or underemployed.*” In these situations the court can impute income “...*based on the obligor’s work history, occupational qualifications, prevailing job opportunities, the ownership by a parent of a substantial non-income producing asset, and earnings levels in the community.*” There is also a default provision: “*If there is insufficient work history to determine employment potential and probable earnings level, there shall be a rebuttable presumption that the parent’s potential income is 75% of the most recent United States Department of Health and Human Services Federal Poverty Guidelines for a family of one person.*” (9)

## Other Deductions to Derive Net Income

Under the former law, there were certain non-tax deductions allowed from income for child support purposes, including the costs paid by a party for medical insurance. All of these deductions have been eliminated under the current law.

There are additional specific deductions allowed by the new statute. One of the significant deductions is for maintenance payments made to the other party. (10) This ensures that before getting to the child support calculation, any maintenance must first be determined. This maintenance amount is then deducted from the payor’s income and added to the recipient’s income. The combined net income is then used to determine the basic child support obligation.

Another deduction is child support *actually paid.* (12) The more expansive language of the new law is not limited to support paid pursuant to a support order. If support is actually paid voluntarily, such support can also be a deduction subject to the following limitation: the amount actually paid “...*or 75% of the support the parent would pay under the child support guidelines, whichever is less...*”

There is also a deduction in cases where each parent “*exercises*” at least 146 overnights in a calendar year (12) – *i.e.* “shared parenting” - and where each parent has at least one child (13) - *i.e.* “split parenting.” For shared parenting situations, the plain language of statute suggests that overnights have to be actually “exercised” as opposed to just being awarded. It is anticipated that shared parenting demands made by parents who have been less involved in the care of their children will be met with skepticism by some judges.

## Final Thoughts

The issues that high-income families face under the new child support laws need to be understood. Judges will be interpreting the new statute for years to come. Just how it will be applied to high-income families is yet to be seen.

- (1) *In re JA*, 316 Ill.App.3d 553, 562 (2nd Dist. 2000); *In re Estate of Walsh*, 2012 IL App (2d) 110938, ¶59.
- (2) *See* 750 ILCS 5/505(a)(2)
- (3) *See* 750 ILCS 5/505(a)(3.4)
- (4) *See*, 750 ILCS 5/505(a)(3.5)
- (5) *See*, 750 ILCS 5/505(a)(3.1)(B)
- (6) *See In re Marriage of Bowland*, 308 Ill.App.3d 1063 (4th Dist. 1999).
- (7) *See*, 750 ILCS 5/505(a)(3.10).
- (8) *See*, 750 ILCS 5/505(a)(3.2).
- (9) For 2017 these guideline are \$11,880.
- (10) *See*, 750 ILCS 5/505(a)(3)(F)(II)
- (11) *See*, 750 ILCS 5/505(a)(3)(F)(I)
- (12) *See*, 750 ILCS 5/505(a)(3.8)
- (13) *See*, 750 ILCS 5/505(a)(3.9)

# Income Shares: The New Face of Child Support in Illinois

As of July 1, 2017, Illinois is now using the “income shares” approach to decide child support. Before the tables on estimated child rearing costs were circulated, no one could tell how direct child support payments would differ. Although the direct child support payments can be less, the increased clarity offered by new rules that apply to differing family structures coupled with more direction on sharing costs beyond the “basic” obligation are intended to increase uniformity in the support process with the hope that support will be more closely related to the standard of living. This overview focuses on the high-level principles of the new guidelines.

## 1. How is Income Shares Different?

Illinois formerly based support only on the income of the higher-earning parent. Income Shares uses both parents’ combined net income to allocate estimated child-rearing costs from “a schedule of basic child support obligations.” The basic obligation covers housing, apparel, food, transportation, entertainment and miscellaneous expenses. It defines “net income” with more detail than before for perquisites, and now spousal maintenance payments shift income from one parent to the other in the net income calculations. Because there is no spousal maintenance in parentage cases, only the income earned - or the income-earning potential of a parent earning less than he is able - is considered in calculating net income. Arguably, this presents a basic case for the higher-earning parent to be allocated more of the other expenses after calculation of the “basic” obligation.

## 2. How Does it Work?

The income shares approach defines “gross” and “net” income, and calculates what percentage of the total net income earned by both parents each parent receives.

It then allocates to that parent the same percentage of the amount necessary to fulfill the basic child support obligation. Once those two numbers - one for each parent - are calculated, the parent who is to make the greater contribution for the basic child support obligation pays the difference between the two figures to the other parent. For example, if the cost of raising one child is \$200 per month based on the combined net incomes of both parents using the provided table, and Parent A earns monthly net income equal to three-fourths or 75% of the total net income earned by both parents, with Parent B earning 25% of the combined net income earned by both parents, then Parent A would be responsible for \$150 of the amount necessary to support the child for the basic obligation and Parent B would be responsible for \$50 of that amount. If the child lived with Parent B, then Parent A would pay Parent B \$150.

The statute also provides how to:

- Define what income is included and excluded;
- Make low income adjustments;
- Calculate support when the income exceeds the maximums in the charts which go up to \$30,000 per month of net income;

- Make adjustments to income;
- Address unemployment and underemployment, incarcerated parents and earnings under the poverty level; and
- Calculate support in families with non-shared children.

## 3. Does Parenting Time Affect the Calculation?

“Shared Physical Care” means each parent exercises 146 or more overnights per year. If this is the case, the calculation then becomes a “cross-multiply and set-off,” increasing the basic care cost by 50% and allocating

costs based both on each parent’s net income and percentage of overnights. Support is also different when each parent has majority parenting time with at least one child. Some commentators believe that the new law may cause more parenting-time disputes, while others recognize that shared parenting (which previously lacked a definition) fueled parenting-time disputes.

## 4. What Expenses are Considered in Addition to the “Basic Support Obligation”?

- Child care
- Health insurance
- Uninsured and extraordinary medical expenses
- Extracurricular activities and school expenses of all sorts

## 5. How Will the New Statute Affect Prior Orders or Judgments?

The statute only applies to decisions made after July 1, 2017, including pending cases where judgment is entered after July 1, 2017. The change in the law, by itself, is not a valid basis to modify prior orders. If there is a basis to modify support because of a “substantial change in circumstances,” unless something in the prior decree or order preserves the use of prior guidelines or some other method of determining support, the court will apply the new law.

## 6. Are the Guidelines Absolute?

The short answer is no. The guidelines are a “rebuttable presumption.” The new law states that guidelines should not be applied if the result would be a financial hardship to a child.



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# What the New Child Support Statute Means for Current Support Awards

Illinois has now joined the majority of states by adopting an “income share” approach to child support. Under the new child support statute, child support obligations will be calculated by considering both parents’ respective incomes, among other factors. This is in contrast to the former approach, where guideline support was a function of the support payor’s net income. These changes to the statute raise an important question: how does the new statute impact current child support orders? This article addresses the application of the law to existing support orders, the standard for modification and potential issues to expect going forward.

## The change in law alone is not a basis for modification

First, the change in the law, by itself, does not form the basis for seeking modification of the current award; there must be other valid circumstances warranting modification. Under section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (“IMDMA”)(750 ILCS 5/510(a)), a court may apply the new child support statute “only upon a finding of a substantial change in circumstances that warrants application of the changes.” So, assuming all of the facts that existed at the time the current child support order in question remain the same, there is no basis to change the child support order. This important feature of the new law is intended to avoid a flood of litigation from individuals eager to modify their child support obligations simply because the law has changed.

## The standard for modification

In Illinois, the standard for modifying a support award remains the same: generally, a support order may be modified based on a substantial change in circumstances occurring after the award was entered. Accordingly, if there has been a substantial change in circumstances taking place after the child support order was entered (irrespective of whether the order was entered before or after the new statute became effective), the new statute would apply.

## The application of Guidelines

Similar to the prior child support statute, the new law provides “guidelines” for child support awards. The guidelines are published on a schedule issued by the Illinois Department of Healthcare and Family Services (HFS).

The statute has a rebuttable presumption that the guidelines should apply. The court may deviate from those guidelines, however, if the application would be “inequitable, unjust, or inappropriate.”

The legislature has provided less guidance for high-income cases. The highest level of the parents’ combined net income on the HFS schedule is \$300,024.99 per month. Section 505(a)(3.5) of the IMDMA (750 ILCS 505(a)(3.5)) provides that the court may use its discretion in setting child support when the parents’ combined net income exceeds that amount. However, the amount of support the court determines cannot be lower than the highest amount set forth on the schedule.

## The impact and considerations when a substantial change in circumstances exists

The consensus of family law practitioners appears to be that, in most cases, “guideline” child support awards under the new statute will be lower than under the prior statute. Where there is opportunity, however, litigation often follows. Consequently, there will likely be a spike in attempts to modify child support awards in the near future, and courts will be left to determine how to resolve novel issues relating to modifications. Yet, in many cases, the courts will be addressing familiar arguments presented in a new light.

For example, support payors are already filing motions to modify based on an increase in their income because, under the new child support provisions, their obligation may likely be lower notwithstanding an increase in income. Countless others will seek to modify simply because one of their children has emancipated, or because they have suffered a loss of income.

In modification proceedings, support recipients faced with a lower-than-expected guideline award may argue that child support should be consistent with the prior order, that the prior order was presumed to be commensurate with the lifestyle the children would have enjoyed had the marriage not dissolved, and that, consequently, an upward deviation from guidelines is warranted. Section 505 of the IMDMA still provides that in determining child support, the court shall consider factors such as the financial resources and needs of the child, the financial resources and needs of the parents and the standard of living the child would have enjoyed had the marriage not been dissolved.



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Courts are already familiar with addressing these arguments, as they mirror arguments that were made under the old child support system.

On the other hand, support obligors may argue that the legislature has declared that both parent’s incomes are now to be considered when determining child support, and that the court should adopt the current law.

How courts resolve these familiar (albeit recast) arguments concerning modification remains to be seen, and will undoubtedly depend upon the specific facts of the case and the consensus amongst the judiciary, if any. It will not be surprising if viewpoints vary from county to county or even from courtroom to courtroom. With the opportunity to reduce payments serving as a catalyst for modification filings, there will undoubtedly soon be many examples.

## IN THE NEWS

**Evan D. Whitfield** is now on the young professionals board of Good Sports, Inc., which donates brand new sports equipment to children in need to promote physical activity and healthy lifestyles.

**Jay P. Dahlin's** article "Unwed fathers should be wary of custody rights, take necessary steps" was published in the Chicago Daily Law Bulletin.

**Schiller DuCanto & Fleck** hosted "Pride Kick-off," a CLE regarding LGBTQ family law issues, followed by a reception.

**Amy N. Schiller's** article "Contrary to popular belief, Sterling saga not over yet" was published in the Chicago Daily Law Bulletin.

**Michele M. Jochner's** article "Karbin steps in to meet needs of aging population, dying marriage" was published in the Chicago Daily Law Bulletin. Michele was also reappointed to the Illinois State Bar Association Family Law Section Council, and newly-appointed to the ISBA Civil Practice and Procedure Section Council for the 2017-2018 bar year.

**Anita M. Ventrelli** was quoted in the New York Times article "After Divorce, Giving Our Kids Custody of the Home." She also served as Faculty Leader for the Family Law Trial Advocacy institute of the family Law Section of the American Bar Association and the National Institute of Trial Advocacy July 7 through July 15, 2017

**Joshua M. Jackson** was recently elected Vice President of the Lake Forest Caucus Committee.

**Michelle A. Lawless** was appointed to the Indiana University Women's Philanthropy Leadership Council.

**Jessica Bank Interlandi** was sworn into the Board of Directors of the Chicago Chapter of the National Association of Women Business Owners (NAWBO) on June 27th for a 2 year term.

**Tanya J. Stanish** was interviewed on Univision regarding the new child support laws in Illinois. Ms. Stanish was also interviewed in Crain's Chicago Business for a roundtable discussion titled "New Child Custody/Support Laws: How the changes affect divorcing couples."

**Burton S. Hochberg's** blog "The Background and History of Pride Month" was published on our Family Law Topics blog as part of our LGBTQ family law blog series.

**Timothy M. Daw** was interviewed on WVON regarding child support and custody.

**Anne Prenner Schimdt's** blog "LGBTQ Health Care Issues on the Horizon" was published on our Family Law Topics blog as part of our LGBTQ family law blog series.

**Jane D. Waller** was selected by Prairie State Legal as one of 40 "Heroes of Justice" for her lasting impact on the organization and the lives of its clients.



*The materials contained in this Newsletter are intended for general informational purposes only and not to be construed as legal advice or opinion.*

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